

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIE JAMES MITCHELL, JR.,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-06-3059
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Willie James Mitchell, Jr., has filed a petition for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254.¹ He alleges ineffective assistance of counsel leading to an involuntary guilty plea, in violation of the Sixth Amendment. Having considered the parties' written submissions and heard oral argument on August 29, 2007, the court recommends that respondent's motion for summary judgment (Dkt. 11) be granted.

BACKGROUND

On June 10, 2002, Mitchell went to the house of his former girlfriend and began kicking her front door, finally forcing his way in. As they argued, Mitchell walked into her garage and returned with a can of lighter fluid. He sprayed the lighter fluid on his girlfriend, and then lit her shirt on fire with a cigarette lighter. She removed her shirt, put out the fire, and called for emergency assistance. Mitchell then physically assaulted her, choking her until she passed out. When she awoke, a police officer had arrived, and Mitchell was taken

¹ The district court has referred this matter to this magistrate judge for report and recommendation (Dkt. 5).

into custody.²

Mitchell was indicted for the offense of burglary of a habitation, a first degree felony. The indictment alleged that Mitchell committed and attempted to commit aggravated assault within the habitation. The indictment also contained an enhancement paragraph alleging a prior conviction for credit card abuse; however, it did not expressly allege the use of a deadly weapon.

The State offered a plea bargain of a 15 year sentence on a plea of guilty to the indicted offense. Given Mitchell's prior conviction, this would have been the minimum sentence possible on the indicted first degree felony. TEX. PEN. CODE §§ 30.02(a)(1) and 12.42(c)(1). Mitchell turned down this offer based on his trial counsel's advice. Instead, he accepted an open plea agreement with the State, by which he would plead guilty to the "lesser" offense of aggravated assault with a deadly weapon, a second degree felony. No agreement was reached concerning punishment. The minimum sentence for this second degree felony was five years; however, with enhancement for a prior conviction, the maximum sentence was the same as for a first degree felony, *i.e.*, 99 years or life. TEX. PEN. CODE § 12.42(b). Mitchell's trial counsel believed that this open plea afforded Mitchell the best chance of receiving community supervision or a lesser prison term.

On December 9, 2002, pursuant to the open plea agreement, Mitchell pled guilty to aggravated assault with a deadly weapon, and pled true to the enhancement paragraph

² These facts are taken from the opinion of the state court of appeals on Mitchell's direct appeal. *Mitchell v. State*, 137 S.W.3d 842, 844-45 (Tex. App. – Houston [1st Dist.] 2004, pet. ref'd).

concerning the prior conviction. After Mitchell entered his plea, the trial court found sufficient evidence to convict, then recessed the proceedings and scheduled a sentencing hearing for the following month. Mitchell filed a motion for community supervision, while the State moved for a life sentence, and gave notice of intent to seek an affirmative finding of the use of a deadly weapon, fire, during the commission of the offense. After consideration of a pre-sentence investigation report, the trial court on January 30, 2003, sentenced Mitchell to 25 years in prison.

The Court of Appeals for the First District of Texas affirmed Mitchell's conviction. Mitchell filed a petition for discretionary review, which was refused on November 10, 2004. Mitchell did not file a petition for writ of certiorari in the United States Supreme Court, and his conviction became final of February 10, 2005.

On October 24, 2005, Mitchell filed a state application for writ of habeas corpus. On June 28, 2006, the Texas Court of Criminal Appeals denied him relief on the findings of the trial court without a hearing and without written order. Mitchell filed this federal petition for habeas relief on September 29, 2006.

Respondent does not contend that Mitchell's petition is time-barred, or that he has failed to exhaust his state remedies. Mitchell seeks federal habeas relief on the grounds of ineffective assistance of counsel during the plea bargaining process.

ANALYSIS

Mitchell's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Mitchell is not entitled to federal habeas relief on his

claims that were adjudicated on the merits³ in state court unless the state court adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision may be “contrary to” federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite of the Supreme Court on a question of law, or if the state court “confronts a set of facts that are materially indistinguishable from a relevant Supreme Court precedent” and reaches an opposite conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court decision involves an “unreasonable application” of federal law if the state court “identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. Federal habeas relief is warranted only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

The Supreme Court has established a two-part test for determining ineffective assistance of counsel habeas claims. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish an ineffective assistance of counsel claim, a defendant must first show that his counsel’s performance was “deficient.” To do this, a defendant must point to specific errors “so serious that counsel was not functioning as the ‘counsel’ guaranteed . . .

³ A denial of habeas relief by the Texas Court of Criminal Appeals constitutes a ruling on the merits of the application. *In re Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

by the Sixth Amendment.” *Id.* The court’s scrutiny of counsel’s performance is highly deferential; the court presumes that counsel’s conduct falls within the wide range of reasonable professional assistance. *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005).

Second, a defendant must demonstrate that his counsel’s performance prejudiced his defense. *Id.* In other words, a defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. The two-part *Strickland* test was explicitly held applicable to challenges to guilty pleas based on ineffective assistance of counsel in *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In such cases, the prejudice requirement “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.* at 59.

1. Counsel’s Advice Regarding Mitchell’s Eligibility for Community Supervision

Mitchell’s first ineffective assistance claim is that trial counsel wrongly advised him to turn down the state’s initial offer of 15 years on a guilty plea to the indicted offense, on the allegedly erroneous advice that Mitchell’s best chance for community supervision was a guilty plea to second-degree aggravated assault with a deadly weapon. Mitchell contends that contrary to counsel’s advice, he was not eligible for community supervision under this plea.

Texas law provides two routes by which a criminal defendant might receive community supervision upon a plea of guilty. The first, styled “judge ordered community supervision,” permits a trial judge to suspend sentence and place the defendant on community

supervision when it is “in the best interest of justice, the public, and the defendant.” V.A.C.C.P., art.42.12 § 3(a). The statute imposes certain limitations upon the authority of the trial judge to order this type of community supervision. For example, a defendant is ineligible if he is sentenced to a term of imprisonment that exceeds ten years. *Id.* at § 3(e)(1). This type of community supervision is also unavailable for certain offenses. *Id.* at § 3g. Among the excluded offenses are those involving use of a deadly weapon. *Id.* at § 3g(a)(2).

Judge ordered community supervision would have been unavailable to Mitchell under either plea option. The indicted offense of first degree burglary of a habitation carried a statutory minimum of 15 years, so a plea to that offense would have ruled out community supervision under art. 42.12 § 3(e)(1). There is also little doubt that the offense to which Mitchell actually pled guilty – aggravated assault *with a deadly weapon* – would have precluded judge ordered community supervision under Art. 42.12 §3g. The State argues that under this section the trial court has the discretion to refuse to enter an affirmative deadly weapon finding in the judgment, even in cases where the offense to which a defendant pled guilty requires the use of a deadly weapon. The only case cited in support of this counterintuitive result, *Ex parte Lucke*, 742 S.W.2d 818, 820 (Tex. App. – Houston [1st Dist.] 1987), was effectively overturned the following year by the Texas Court of Criminal Appeals in *Ex parte Poe*, 751 S.W.2d 873 (Tex. Crim. App. 1988) (trial judge retains no discretion to withhold entry of deadly weapon finding made by trier of fact).

The unavailability of judge ordered community supervision does not end our inquiry, however. The second route to community supervision, deferred adjudication, is subject to

separate legal standards under art. 42.12 § 5. Unlike the “judge ordered” variety, community supervision upon deferred adjudication is not automatically precluded for deadly weapon offenses. Art. 42.12 § 5(a) reads in pertinent part:

[W]hen in the judge’s opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant’s guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.

Although there are certain statutory limitations and exclusions limiting the trial court’s discretion, none appear applicable to Mitchell’s case. In fact, Mitchell makes no argument that he was ineligible for deferred adjudication community supervision at the time he entered his guilty plea to aggravated assault with a deadly weapon in December 2002. Instead, he argues that “[d]eferred adjudication community supervision was not a lawful option at the sentencing proceedings conducted on January 30, 2003.”⁴ This argument rests on his contention that deferred adjudication is available only in the absence of an adjudication of guilt, and that the trial court had in fact adjudicated Mitchell’s guilt after he entered his plea in December.⁵

But the issue is not whether deferred adjudication was available at the time of sentencing in January 2003. By that point the die was already cast, because Mitchell had

⁴ Petitioner’s brief, at 19.

⁵ In support of his argument that he was adjudicated guilty on December 9, 2002, Mitchell submits the following evidence: (1) the trial court docket sheet, which includes a December 9, 2002 notation reading in part “adjudged guilty;” (2) the cover of the state’s file which reflects the “Disposition Date” of 12-9-02; and (3) the transcript of his sentencing hearing, at which the trial judge stated “having found you guilty of this offense . . . ,” indicating a prior, not contemporaneous, adjudication of guilt.

taken his attorney's advice and pled guilty the previous month. The real issue is whether such community supervision was available at the time he entered the guilty plea in December. If Mitchell's attorney correctly advised him of that possibility in advance of the guilty plea, then it is irrelevant whether the trial court's denial of deferred adjudication community supervision occurred in December or January.

On this record, Mitchell was undoubtedly eligible, at least in theory, for deferred adjudication community supervision at the time of his plea. The state habeas court expressly held that under Texas law Mitchell "was eligible for deferred adjudication community supervision pursuant to a guilty plea for either burglary of habitation [sic] or aggravated assault with a deadly weapon."⁶ This conclusion is not only reasonable, but also clearly correct as a matter of state law. Thus Mitchell's trial counsel did not misadvise him about the possible legal consequences of his plea to the aggravated assault charge.

Whether community supervision was a *likely* outcome is of course a different question, and not particularly pertinent under the *Strickland* standard. Taking a calculated risk based on an accurate understanding of the possible consequences of a guilty plea does not implicate Sixth Amendment right to counsel concerns. *See Martinez v. Dretke*, 404 F.3d 878, 885 (5th Cir. 2005) ("a conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."). Mitchell's trial counsel testified that in his opinion pleading guilty to the "lesser" second degree felony offered the

⁶ *Ex Parte Mitchell*, WR-64,501-1, at 112.

“best potential path to probation,” notwithstanding that it was “risking more time than the State’s plea offer.”⁷ It is easy to second-guess such judgments in hindsight, but at the time it was given, counsel’s advice was neither irrational nor obviously ill-chosen.

Given that deferred adjudication community supervision was a legal option available to the trial judge in response to Mitchell’s guilty plea, Mitchell’s first ineffective assistance claim must be rejected.

2. Counsel’s Failure to Advise Mitchell Regarding Parole Eligibility

Mitchell further argues that his counsel was ineffective in advising Mitchell to plead guilty to an offense with less favorable parole eligibility requirements than the indicted offense. On conviction for the indicted offense, Mitchell would have been eligible for parole after serving one quarter of his sentence, including flat and good time credits. TEX. GOV’T CODE § 508.145(f). The offense to which Mitchell pleaded guilty requires him to serve one half of his sentence in flat time, without regard to good time credits, before parole eligibility kicks in. TEX. GOV’T CODE § 508.145(d). Mitchell contends that his counsel never discussed parole eligibility with him; the state habeas court made a finding confirming that fact.⁸

The state first contends that trial counsel does not have an affirmative duty to discuss parole eligibility with a defendant, citing *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). However, the majority opinion in *Hill* based its ruling on lack of prejudice, and expressly declined to

⁷ *Ex parte Mitchell*, WR-64,501-01, at 107.

⁸ *Ex Parte Mitchell*, WR-64,501-01, at 112.

decide whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance. *Id.* at 60. In a concurring opinion joined by Justice Stevens, Justice White declared that “failure of an attorney to inform his client of the relevant law [regarding parole eligibility] clearly satisfies the first prong of the *Strickland* analysis adopted by the majority. . .” *Id.* at 62. Similarly, while the Fifth Circuit has not squarely resolved the issue, it has recognized the potential viability of such a claim. *See James v. Cain*, 56 F.3d 662, 668 (5th Cir. 1995) (remanding with directions to the district court to “evaluate whether the attorney affirmatively misinformed *or failed to inform* James about the parole process, and, if so, whether such misinformation *or failure* rendered the attorney’s actions objectively unreasonable.) (emphasis supplied); *but see Czere v. Butler*, 833 F.2d 59, 63 n.6 (5th Cir. 1987) (expressing “doubt” that there is an affirmative obligation to inform client of parole consequences under Sixth Amendment) (*dicta*).

Given this uncertainty on the deficient performance issue, the court is inclined to follow *Hill*’s lead and proceed directly to the prejudice prong of the analysis. Here, Mitchell falls well short of demonstrating a reasonable probability that his counsel’s performance “affected the outcome of the plea process,” as *Hill* requires.⁹ Even if Mitchell’s counsel had

⁹ The State argues that *Hill*’s alternative, and more stringent, formulation of the prejudice requirement should be applied here – *i.e.*, that “defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” 474 U.S. at 59. The court is not convinced that this standard is appropriate where, as here, the crux of defendant’s claim is that counsel’s errors led to an uninformed choice between two possible guilty pleas, resulting in more prison time. It is a moot point in any event, because Mitchell cannot satisfy *Hill*’s more lenient (continued...)

thoroughly reviewed with him the parole consequences of both plea options under consideration, it would not have affected the outcome of the plea process, because his parole eligibility date would most likely be the same under either plea.

As previously noted, Mitchell's plea to an offense involving a deadly weapon meant that he would not be eligible for parole until he served one half of his sentence in flat time. TEX. GOV'T CODE § 508.145(d). On the other hand, if he had entered a plea of guilty to the indicted offense (burglary of a habitation) pursuant to the State's original offer, he would *in theory* have been eligible for parole after serving one quarter of his sentence, including both flat time and good time credits. *Id.* at § 508.145(f). But that theoretical eligibility date assumes, contrary to the record evidence, that the State would neither seek nor obtain an affirmative deadly weapon finding in the final judgment. Such a finding would have put Mitchell in precisely the same parole category in which he now finds himself.

There is abundant evidence in the record that the state intended to seek an affirmative deadly weapon finding even if Mitchell accepted the state's initial plea offer on the indicted charge of burglary of a habitation.¹⁰ In Mitchell's state habeas case, the trial court found that it was authorized to enter an affirmative deadly weapon charge under either a plea of guilty

⁹ (...continued)
articulation of the prejudice standard.

¹⁰ The prosecutor states that she repeatedly informed defendant's counsel of her intent to seek an affirmative deadly weapon finding regardless of the charge to which Mitchell pleaded. *Ex Parte Mitchell*, WR-64,501-01, at 109. Trial counsel's affidavit indicates that he does not recall having discussions as to whether the state would pursue a deadly weapon finding on a guilty plea to burglary of a habitation, but he likely presumed it would do so because the facts were the same whatever the label used for the plea. *Id.* at 107.

to burglary of a habitation or aggravated assault with a deadly weapon.¹¹ Implicit in the trial court's finding is a finding that the state gave defendant sufficient notice of the prosecution's intent to authorize a deadly weapon finding. The state court's findings are not unreasonable based on the record. Nor does Mitchell offer any explanation how the trial court could reasonably have refused to make a deadly weapon finding, based on the defendant's admitted version of events.

Because Mitchell cannot show a reasonable probability that the outcome of the plea process would have been different if counsel had properly advised him about parole, his ineffective assistance claim on this ground must be denied.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that respondent's motion (Dkt. 11) be granted and Mitchell's petition be denied with prejudice.

In order to be entitled to a certificate of appealability, Mitchell must make a substantial showing that his constitutional right to effective assistance of counsel was violated. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To satisfy this standard, Mitchell must show that "reasonable jurists could find the district court's resolution of his constitutional claims debatable or that reasonable jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The court finds that Mitchell has met this standard and recommends issuance of a certificate of appealability.

¹¹ *Ex Parte Mitchell*, WR-64,501-01, at 112.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on September 6, 2007.



Stephen Wm Smith
United States Magistrate Judge